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FRANCES SEGHERS  
EXECUTIVE DIRECTOR  
FEDERAL AFFAIRS

January 4, 1993

Donna Searcy  
Secretary  
Federal Communications Commission  
1919 M St. NW  
Washington, D.C. 20554

RE: Cable TV Consumer Protection and Competition Act of 1992  
Rate Regulation and Leased Access  
MM Docket No. 92-259

Dear Ms. Searcy:

Attached please find a copy of the comments of the Motion Picture Association of America (MPAA) in the above-referenced docket. Copies also are being delivered to the Commissioners and their staffs. If you have any questions, please let me know.

Sincerely,

*Frances Seghers*

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )  
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Implementation of the Cable Television )  
Consumer Protection and Competition Act )  
of 1992 )  
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MM Docket No. 92-259

TO: The Commission

COMMENTS OF THE MOTION PICTURE ASSOCIATION  
OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") respectfully submits its comments in response to the "Notice of Proposed Rulemaking" ("NPRM") (FCC 92-499) in the above-referenced proceeding.

MPAA represents seven leading U.S. producers of motion picture and television programming.<sup>1</sup> As program providers, MPAA's members are seriously concerned with the implications of retransmission consent ("RTC") for their contractual and copyright interests.

We have opposed retransmission consent because it creates an illogical distinction between rights in a TV "signal" and rights in the "programs" carried by that signal premised on the "value" that the signal has to cable operators and cable subscribers. Plainly,

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<sup>1</sup> Fox, Inc. is filing separate comments in this proceeding.

a retransmitted broadcast television "signal" has no value to cable systems or viewers except as the carrier of programs that viewers want to see.<sup>2</sup>

We have also opposed RTC because it collides with the compulsory copyright license. As the Copyright Office has consistently maintained, "the power to withhold consent makes retransmission consent the equivalent of copyright exclusivity and creates a conflict with the cable compulsory license of section 111 of the Copyright Act."<sup>3</sup>

Moreover, we have opposed RTC because, in principle, it collides with typical TV program license agreements, which may specifically prohibit broadcasters from claiming or exercising RTC authority with regard to cable and other media.

Despite all of these obvious flaws, the Congress established retransmission consent in the Cable Consumer Protection and Competition Act of 1992 ("1992 Act") by creating new Section 325(b). Tacitly conceding the conundrum it has created, Congress conditioned broadcasters' exercise of RTC by providing that "nothing in

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<sup>2</sup> Although the courts have found that the broadcaster's compilation of copyrighted programming into a broadcast day is itself copyrightable, they have determined that the value of the compilation is negligible. National Assn. of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982).

<sup>3</sup> Summary of Statement of Dorothy Schrader, Associate Register of Copyright for Legal Affairs, before the Subcommittee on Intellectual Property and Judicial Administration, House Committee on the Judiciary (July 10, 1991).

this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcast stations and video programmers."<sup>4</sup> In this way, Congress attempted to address the concerns of program suppliers about RTC. The Commission must keep this provision squarely before it as it attempts to implement RTC.

#### I. The Inviolability of Contract

The NPRM is flat wrong when it says that the statute merely "suggests that any rights created by Section 325(b)(1)(A) can be superseded by the express terms of existing or future agreements between program suppliers and broadcast stations" (NPRM at para. 65, emphasis added) -- rather, Section 325(b)(6) clearly and unambiguously recognizes the absolute right of program suppliers and broadcasters to arrange their business relationships, insofar as RTC is concerned, in any way they see fit, and requires that the intent of the parties to such agreement must prevail over any rights created in Section 325(b)(1)(A). The Commission should now stipulate in its regulations what the Congress has made plain.

Beyond that, however, the Commission should not go.

The Commission should not become involved in the interpretation of any specific existing or future contract, nor promulgate

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<sup>4</sup> Section 325(b)(6) of the Communications Act, as amended.

rules of contractual interpretation.

The Commission should neither speculate nor rule on the consequences of any contractual language (or lack thereof) that may affect retransmission consent. Specifically, the Commission should not conclude that a broadcaster "in the absence of any express contractual arrangement, [may] grant or withhold retransmission consent without authorization from the copyright owner." (NPRM at para. 65) The actual intent of the parties, not Commission second-guessing of what the parties may or may not have intended by not "express[ly]" addressing RTC in a program licensing agreement, should control.

The courts, not the Commission, are best equipped to resolve any disputes over interpretation. Contractual disputes are the province of the courts, and it would be inappropriate as well as inefficient for the Commission to take on this responsibility. Once it has recognized the absolute right of contracting parties to grant, waive or condition RTC rights as they see fit, the Commission should expressly reject jurisdiction over such disputes.

## II. "Multichannel Video Programming Distributors"

Every "multichannel video programming distributor" as defined in the Act should be required to obtain RTC. This includes operators of cable television, multichannel multipoint distribution service ("MMDS" or "wireless cable"), satellite master antenna television ("SMATV"), and direct broadcast satellite ("DBS")

systems, distributors of programming to home satellite dish ("HSD") owners, and offerors of "video dialtone" ("VDT") service<sup>5</sup>, as well as any other known or potential multichannel distributor, without regard to whether the entity is entitled to exercise a compulsory copyright license,<sup>6</sup> and without regard to whether the operator or distributor is licensed or franchised by a government body.<sup>7</sup> In general, we concur with the Commission's view that "the retransmission consent obligation should fall on the entity directly selling programming and interacting with the public." (NPRM at para. 42). The important thing is that the obligation must rest with a readily identifiable and responsible party.

The Commission should expressly recognize in its new rules

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<sup>5</sup> In general, the obligation to obtain RTC should apply to the party who is the ultimate distributor of programming to the subscriber. Thus, if video dialtone works as anticipated, the responsible entity would generally be the party that contracts with the telephone company for VDT capacity, rather than the telephone company itself. However, in the event that the telephone company itself exercises some form of editorial control over programming offerings on VDT (such as selecting which broadcast stations will be carried on the system), it should be the responsible party.

<sup>6</sup> If one accepts, for the sake of argument, that the retransmission consent right is separate and distinct from copyright, then there is no rationale for making distinctions in applying RTC "based on whether the entity involved is covered or not covered by the compulsory copyright licensing provisions of the Copyright Act." (NPRM at n. 54)

<sup>7</sup> The definition is expressly subject to certain exclusions contained at new Section 325(b)(2) of the Communications Act.

that even if a multichannel distributor obtains retransmission consent to carry the "signal" of a broadcaster, retransmission of the programming contained in that signal remains subject to necessary copyright clearances, either through applicable compulsory licensing procedures or through marketplace negotiations.

### III. Content to be Carried

The Commission tentatively concludes that the language of Section 325(b)(4), which provides that a station electing "to exercise its right to grant retransmission consent... with respect to a cable system, the provisions of Section 614 shall not apply to the carriage of the signal of such station by such cable system," means that no provision of Section 614 applies to carriage of broadcast stations electing retransmission consent. This is not entirely correct.

Section 614(b)(3)(B) states that "the cable operator shall carry the entirety of the program schedule of any television station carried on the cable system..." subject only to the sports programming, syndicated exclusivity and network non-duplication rules (emphasis added). By its plain wording, this obligation attaches to the carriage of every local and distant broadcast signal by a cable operator, whether the station has elected must-carry (in the case of cable systems in its market) or RTC status. This reading is supported by the fact that virtually every other provision of Section 614 speaks in terms of a narrower class of

broadcast signals; e.g., the Section 614(b)(6) provisions on channel positioning speak in terms of signals "carried in fulfillment of the carriage obligations of a cable operator under this section", i.e., must-carry signals only.

This provision can be readily reconciled with the language of Section 324(b)(6) which, as discussed above, must be read to permit program suppliers and broadcasters to order their business relationships contractually with regard to RTC in any way they see fit. Thus, if a broadcaster elects RTC status, and if the contract for broadcast of a particular program restricts the ability of the broadcaster to grant RTC for the portion of its signal containing such program, the requirements of Section 614(b)(3)(B) are superseded as to such program, just as the requirements of that section would be superseded by the operation of the Commission's sports broadcasting, syndicated exclusivity or network non-duplication rules.

Congressional intent in Section 325(b)(4) is not to override the plain-language requirements of Section 614(b)(3)(B); rather, the intent of the former section is to ensure that once a station has made an RTC election, it cannot subsequently demand must-carry status (at least during the term of the election) because, for instance, it finds that it cannot interest cable operators in carrying it.

We urge the Commission to adopt this more rational interpretation of the new statute.

#### IV. Copyright Considerations

The 1992 Act requires, at Section 6(b)(3)(A), that a broadcast station elect either "must-carry" or "retransmission consent" status for purposes of carriage by cable systems within its market by one year after enactment of the Act and every three years thereafter. The Commission is given discretion to specify the dates by which those elections are to be made.

With one exception, no strong reasons exist for coordinating the election dates with the Statement of Account periods under Section 111 of the Copyright Act.<sup>8</sup> The exception involves the situations specified in new Section 614(b)(10)(B) of the Communications Act, which permits commercial stations opting for must-carry status to indemnify cable systems for increased copyright liability. A similar situation is presented where a noncommercial station may seek to be added under the new must-carry rules governing such stations. See new Section 615(i)(2) of the Communications Act.

In these cases, MPAA suggests that the date for election be set so that carriage begins on either January 1 or July 1 of a given year, which would coincide with the start dates for the cable royalty accounting periods. 37 C.F.R. Sec. 201.17(c)(1).

Under governing copyright regulations, cable systems must make the full royalty payment for a station regardless of whether the

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<sup>8</sup> 17 U.S.C. Sec. 111.

station is carried for all or a portion of the accounting period. 37 C.F.R. Sec. 207.17(f)(2)(i). When a station which is "distant" for copyright purposes elects must-carry status in the middle of an accounting period, the affected cable system(s) must pay the full royalty fee for that period. Presumably, the cable system would seek to recover the full payment from the station as the system's indemnification allowed by the 1992 Act.

The Commission should consider this factor in setting the dates on which stations indemnifying cable systems can elect must-carry status. Coordinating the election dates with the start of the cable royalty accounting periods would avoid potential disputes concerning the proper amount of indemnification and would be administratively efficient.

The NPRM indicates that the Commission will revise the top 100 market list found in Section 76.51, and invites comment on whether the Commission "should consider the possible copyright implications of any change made." The Commission should restrict its considerations to communications policy objectives and avoid any implications about the effects, if any, of the revisions on cable copyright matters. The 1992 Act itself does not change copyright law, and nothing suggests that Congress expected the Commission to modify copyright law in its rulemakings.<sup>9</sup>

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See new Section 624(b)(6) of the Communications Act: "Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code...."

The NPRM also states that the Commission "understands that if this [top 100 market] list is modified, the Copyright Office would use the revised list for determining copyright liability." Id. No support can be found for that statement: the cable compulsory license does not allow the Office simply to adopt changes made by this Commission to its rules without examining their impact on royalty fees.<sup>10</sup>

The Copyright Office cannot determine the effect of a revised top 100 market list by itself. A revised "top 100" list could affect the royalty fees paid for additional stations carried after deletion of the Commission's distant signal rules ("the 3.75% royalty"). While the Copyright Office administers filings for that fee, the 3.75% royalty was created by the Copyright Royalty Tribunal ("CRT"). Both the CRT and the Copyright Office must be involved in determining the copyright implications of a revised "top 100" list.<sup>11</sup>

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<sup>10</sup> See, e.g., H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976): modifications in copyright law due to rule changes by the Commission "which would materially affect the royalty fee payments provided in the legislation... should only be made by an amendment to the statute.")

<sup>11</sup> 17 U.S.C. Sec. 111(d).

MPAA urges the Commission not to opine about the copyright effects of a "top 100 market" list revision, but to leave that evaluation to the agencies which have direct authority over implementation of the compulsory copyright license plan.

Respectfully submitted,

MOTION PICTURE ASSOCIATION  
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